PUBLIC PROSECUTOR

v.

CHAN AH KOW & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[FT CRIMINAL TRIAL NO. 39 OF 1984]
26 APRIL 1988

CRIMINAL LAW: *Dangerous Drugs - Second accused rider of motor cycle - Basket between the legs of second accused - Package containing heroin in the basket - First accused pillion rider - Whether both accused had control, possession, knowledge and were trafficking in dangerous drugs - Common intention to traffic.*

Both the accused were charged under s. 39B of the Dangerous Drugs Act 1952. Acting on information the police tailed a motorcycle ridden by the second accused where the first accused was the pillion rider. The police forced the accused's motorcycle to the left side of the road, on to the side table. The motor cycle fell into the drain together with the rider. The pillion rider fell on the sidetable. This is when the police took possession of a package wrapped in a red plastic bag from the motor cycle. At the close of the prosecution case, the first accused was acquitted and discharged as no case was made out against him even on a *prima facie* basis. The second accused was called to make his defence on an amended charge - dropping the element of common intention. He claimed trial to the amended charge. The second accused denied knowledge of the bag of heroin stating that the bag belonged to the first accused who had placed the bag into the basket of the motorcycle.

Held:
On the evidence adduced by both prosecution and the accused; no reasonable doubt had been created and on the balance of probabilities it was found the accused was trafficking in drugs.

[Accused was convicted of the charge.]

Case referred to:
Mahbub Shah [1945] 47 Bom LR 941

Legislation referred to:
Dangerous Drugs Act 1952, ss. 33, 37(d) 39B(1)(a), (2)
Penal Code, s. 34

JUDGMENT

KC Vohrah J:

The first and second accused were charged as follows:

> That you jointly on 23 May 1984 at about 10.10 a.m., at the 4th mile, Jalan Cheras in the Federal Territory of Kuala Lumpur, in furtherance of the common intention of you both, did on your own behalves traffic in dangerous drugs, to wit, 1599.74 grammes of Heroin, in contravention of para. (a) of sub-section (1) of s. 39B of the Dangerous Drugs Act, and thereby committed an offence punishable under s. 39B(2) of the said Act, read with s. 34 of the Penal Code.

ASP Hasnah bin Hamzah (PW3) with Inspector Maarof (PW4) and Detective Corporal Mohd. Saad acting on information waited in a car near Taman Midah roundabout at about 10.05 a.m. They were in civilian clothes. PW3 saw a motor cycle WAV 4932 proceeding towards the roundabout from the direction of Taman Midah.

On seeing this motor cycle, PW3, who was driving his own car, said he tailed it for about 5 to 10 minutes away from the roundabout, about ½ mile from it, until they were near a BP petrol station at the 4½ milestone Jalan Cheras. He instructed Inspector Maarof to introduce themselves as the police and to order the rider of the motor cycle and his pillion to stop. He said Inspector Maarof poked his head out of the window, showed his authority card and shouted out 'Polis! Polis! Berhenti" but the motor cyclist did not stop. At that time the motor cycle was about 5 to 6 feet ahead of the car. PW3 said he noticed that the pillion rider was looking behind towards his vehicle off and on before this identification but it became more often after the identification. He also saw that there was a basket between "the handle of the motor cycle and the rider of the motor cycle." He said the basket was between the legs of the rider and he noticed a package wrapped in a red plastic material in the basket.

PW3 said that after PW4 had shouted out to these two people, the rider of the motor cycle attempted to accelerate the speed of the motor cycle and when he saw that he "squeezed the motor cycle to the left side of the road, on to the sidetable where there were small stones." The rider tried to come out on to the road proper, the attempt was not successful and both the rider and the pillion fell on the sidetable. He stopped his car and all of them rushed towards the fallen motor cycle. He amplified what he saw - "The motor cycle had fallen into the drain together with the rider, the pillion rider fell onto the sidetable."

He said he rushed towards the pillion rider, the first accused, while Inspector Maarof and Corporal Saad rushed towards the rider of the motor cycle. He said that the pillion rider attempted to resist arrest but he managed to arrest and handcuff him. He added that Inspector Maarof and Corporal Saad managed to arrest the rider of the motor cycle, the second accused. This incident took place at a place slightly past the BP Petrol station.

He then went up to the motor cycle and he saw a package wrapped in a red plastic bag (P25) and he took it out. In the presence of both the accused from the bag he took out 4 brown packages (P27A to D), each wrapped in brown paper, and in each package he found powder in a compressed form which he suspected to contain dangerous drugs. The chemist report stated that the substance in the 4 packages altogether contained 1599.14 grams of heroin.

He did a body search on both the accused and recovered several items from them.

He then brought the red plastic bag and the 4 packages containing the heroin and other exhibits to the Cawangan Anti Dadah office at Jalan Kia Peng together with the two accused and handed both of them and the exhibits to Inspector Amarjit Singh (PW5) on the same day.

Inspector Maarof (PW4) gave substantially similar evidence though there was some variance on some of the facts described by PW3. PW4 confirmed the laying of the ambush at the Taman Midah roundabout and he confirmed spotting the said motor cycle with 2 persons on it and tailing it. He said that when the car came abreast the motor cycle he poked his head out, showed his authority card and shouted "Polis! Polis! Polis" and ordered the persons to stop. The motor cycle did not stop but instead it speeded up a little bit and he saw the pillion rider (the first accused) looking at him and PW3 several times. PW3 said the traffic

was heavy at that time and that perhaps it was difficult for the motor cycle to slip through and pass. Then, past a petrol kiosk, he saw the pillion rider fall on the sidetable and the rider of the motor cycle, the second accused, fall into the drain by the side of the road together with his motor cycle. While he did not mention that the police car squeezed the motor cycle to the side, he mentioned that "we subsequently managed to stop the motor cycle." The motor cycle fell straight into the drain in a standing position. He said PW3 then stopped his car near the pillion rider and he and DPC Saad went up to the motor cycle in the drain and lifted up the rider of the motor cycle; his right leg was caught between the motor cycle and the wall of the drain. By that time, he said, PW3 had come along to where he was with the first accused and he saw PW3 recover a red plastic bag from the carrier of the motor cycle. The red bag contained 4 packages wrapped in brown paper.

He also said that the rider of motor cycle had injuries on the right leg from thigh downwards. He explained that this man's right leg was trapped between the motor cycle and the drain when he assisted him to come out of the drain.

I now turn to the evidence of PW5, Inspector Amarjit, the investigation officer of this case. He confirmed receiving the red plastic (P25) containing the 4 packages (P27A to D) from PW3 at the Cawangan Anti Dadah Office at Jalan Kia Peng on the day of the arrest. He confirmed receiving the personal items found on both the accused together with the search lists made out in respect of each of them. He stated that he packed the 4 packages (P27A to D) which were marked A1 to A4 in brown paper and marked and sealed this larger package and sent the latter to the Government Chemist Mr. Lau Cheng Siew on 28 May 1984. On the same day Mr. Lau returned to him the same larger package, this time resealed with the Chemistry Department seal after Mr. Lau had taken samples from each of the 4 packages packed in the larger package. On 28 August 1984 he received from Mr. Lau a chemist report (P33) together with a brown sample from packages A1 to A4. He said packages A1 to A4 referred to P27A, B, C and D respectively. PW5 also stated that he went to the scene with a police photographer (PW2) in order for photographs (P3A to C) to be taken and for a sketch plan (P31) of the scene to be drawn.

The chemist report (P33) indicated that the gross weight of the substance in the four packages was 1795.42 grammes and contained 1599.74 grammes of heroin.

Before I deal with the question of whether a *prima facie* case of trafficking has been made in respect of both the accused I would need to consider the evidence of the prosecution witnesses in the light of questions directed at them by both defence Counsel.

Principally the cross-examination was directed at showing that both the accused were unaware of the drugs by the allegation that the car driven by PW3 collided into the motor cycle ridden by the second accused. The allegation was that that was the reason why the basket of the motor cycle was damaged and why the second accused suffered injuries on his leg. There was however no dispute that the 4 packages of drugs were found in the basket of the motor cycle. But it was disputed that Inspector Maarof shouted to both the accused to stop. It was disputed that the rider of the motor cycle accelerated his motor cycle after the shout. It was shown that PW3 said the police car tailed the motor cycle for ½ mile for about 5 to 10 minutes while PW4 said the tailing was for about ½ hour. It was disputed that the pillion rider (first accused) looked at the police off and on when PW4 had shouted to them to stop and it was disputed that he attempted to resist arrest by PW3. There was also the rather strange question put by Counsel for the first accused (rider of motor cycle) to ASP Hasnah that after both the accused fell, he and the other office covered the faces of both the accused.

As regards the allegations that PW4 did not shout to both the accused to stop and that the car of PW3 collided into the motor cycle the evidence of PW3 and PW4 was clear that PW4 shouted to both of them to stop and the speed of the motor cycle did increase even if slightly, and when hemmed in by the police car, the motor cycle went onto the sidetable where there were stones. It seems clear that the uneven nature of the sidetable caused the motor cyclist to lose balance and as a result the pillion rider fell down on the sidetable while the motor cycle ended up upright in a drain by the side with the rider on it. Admittedly PW3 stated that when PW4 shouted to the two accused identifying himself as a police officer his car was 5 to 6 feet behind the motor cycle, while PW4 stated that when he did so, the car was 4 to 5 feet abreast of the motor cycle. And admittedly there was discrepancy between the evidence of PW3 and PW4 as to how long the police car tailed the motor cycle. But these are matters of recollection of details of events which took place some 4 years ago, of fleeting events observed in a moving vehicle, and they do not detract from the main thrust of that aspect of the prosecution evidence that the police spotted and tailed a motor cycle, that the police identified themselves at close quarters and that after their identification, the motor cycle instead of stopping continued to move on. Both PW3 and PW4 could have but did not exaggerate - PW3 said the motor cycle attempted to accelerate and PW4 said the motor cycle "speeded a little bit."

The allegation that the pillion rider (the first accused) did not look behind off and on was denied by PW3 and PW4; their clear evidence was that he did.

As regards the allegation that the pillion rider did not struggle during the arrest, PW3 stated that the pillion rider (the first accused) fell onto the sidetable and he rushed towards him to effect his arrest but "there was a slight trouble when the accused was trying to avoid the arrest."

As regards the injuries sustained by the second accused, there was no denial that he had injuries on the outer part of his right limb from the thigh downwards. PW4 had stated that the motor cycle and the rider (the second accused) on it had landed upright in the drain and his right leg was "caught between the motor cycle and the drain wall and could not come out." The injuries were clearly sustained by the second accused when he fell into the drain, and not as a result of the police car colliding into the motor cycle. The defence attempt to show that the two accused were unaware of the presence of the police until their motor cycle was knocked into by the police car, is not borne out by the evidence of PW3 and PW4 describing the overt acts of both the accused before the discovery of the drugs in the basket carried by the motor cycle.

As regards the allegation put to PW3 that the faces of the two accused were covered at the scene, PW3 denied this.

At the close of the case for the prosecution, on a *prima facie* basis, it seems unarguable that it was the second accused, riding the motor cycle, who had the control of the motor cycle. The exposed basket attached to the front body of the motor cycle lay suspended between his legs and in this basket, unconcealed, was the red translucent plastic bag containing 4 packages weighing over 1.7 kilos. There can be no doubt he was aware of these 4 packages, he was in close proximity to them, he was nearest to them and to my mind he had control over them when viewed with the other circumstances of the cases. He was called upon to stop by a police officer after loud identification that the latter was from the police, but he did not stop. He continued to ride on, in fact, "speeded a little bit," - but the traffic was heavy and he could not slip through the traffic - when hemmed in by the police car

onto an unstable sidetable laid with stones, he lost his balance and ended up in the drain with his motor cycle. It is clear it was he who had control of the motor cycle and he attempted to escape from the police and there was no reason to do that unless he was aware he was transporting non-innocent goods; clearly he had control of the bag containing the 4 packages in the basket attached to the motor cycle; he was the one who could take the 4 packages out of the reach of the police if the motor cycle had not ended up in the drain. And so far as he is concerned having been in control of the 4 packages, under s. 37(d) of the Dangerous Drugs Act 1952 it has to be presumed that he was in possession of the 4 packages containing the heroin and it has to be presumed that he was aware that the drug was heroin. Again since the heroin was 1599.74 grams, the presumption is that he was trafficking in the heroin.

Whilst on a *prima facie* basis the criminal act of trafficking in heroin has been made out against the second accused can such act of trafficking be attributable to the first accused? Is there any evidence to show that it was the common intention of both the second accused and the first accused to traffic in the heroin? Were both of them acting in concert for the trafficking? The evidence showed that the first accused sitting as pillion rider looked back off and on although it does not appear that he was aware of the presence of the police car at first. When however PW4 identified himself as from the police and shouted for the motor cyclist to stop, his looking back off and on became more pronounced. Eventually after he fell down it appeared that he attempted to put up some resistance to his arrest. His action may appear highly suspicious but it has to be remembered that he was merely the pillion rider of the motor cycle and had no control over the movements of the motor cycle. At best he appeared to be a lookout but there does not appear to be any evidence to show that he knew that a bag, let alone heroin, was carried in the basket between the legs of the second accused who was riding the motor cycle.

While it may be argued that the evidence relating to his acts could not well be those of an innocent man and that it must be inferred that he knew of the presence of the bag and its contents, his acts could equally point to the first accused being a mere passenger caught in a chase or a passenger who knew at best that the second accused was carrying non-innocent goods, not necessarily heroin or a lookout for whatever reason the second accused intended him to keep a lookout for, the reason given by the latter not necessarily being connected with the bag of heroin. It will be noted that PW3 had stated that the first accused "attempted to resist arrest.", not that he resisted arrest. The first accused is a huge hulk of a man while PW3 is of average build and my view is that the first accused could have effectively put up strong resistance to his arrest by PW3 if indeed he wanted to but the evidence that he "attempted to resist" arrest or that "there was a slight trouble" in effecting the arrest without the details as to what constituted the attempt or trouble is an opinion which needs to be kept in proper perspective in the light of the other evidence relating to the first accused. To my mind his behaviour was highly suspicious but there was lacking those extra circumstances to show at least he had control of the goods in the basket so that I may invoke the presumptions in s. 37(d) of the Dangerous Drugs Act 1952 as I did in the case of the second accused, that he was in possession of the goods and that he knew the goods contained heroin or circumstances to show that he did something in relation to the goods although they were out of his sight, and from which circumstances I may draw the inference that both of them intended to and did the act of trafficking in heroin, and that the act was done pursuant to a common intention of both of them. As is well known the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case: *Mahbub Shah* [1945] 47 Bom LR. 941, 943. The circumstances in this case though highly suspicious do not give rise to such an inference.

I asked for submissions on s. 33 of the Dangerous Drugs Act as to whether I could amend the charge against the first accused for the offence of abetment of the trafficking by the second accused or for the offence of doing an act in furtherance of the offence of trafficking. Having heard the submissions my view is that there is no evidence of instigation nor of conspiracy to found a charge of abetment. Nor could there be a charge of abetment that he intentionally aided the trafficking as there was no evidence that the first accused intentionally aided the second accused to traffick in the heroin. As for the offence of doing an act in furtherance of the offence of trafficking I had in mind that the evidence probably showed that he could have been a lookout, but again viewing the evidence as I did when I examined the question whether common intention could be invoked, the evidence does fall short of showing that his role as a lookout was behaviour which can constitute doing an act in furtherance of the offence of trafficking.

The net result of the case is that there was no evidence on which I could call the first accused to make his defence on the charge or on any amended charge and I therefore acquitted him.

I amended the charge against the second accused by dropping the element of common intention. He claimed trial to the amended charge. He declined to recall any witness.

Defence

Low Ee Tik (the accused) elected to give his evidence on oath and called 2 witnesses, DW2 (who had been acquitted earlier) and DW3.

He denied knowledge of the bag of heroin. He said the bag which was in the basket attached to his motor cycle was put there by Chan Ah Kow, the person who had been acquitted at the close of the case for the prosecution.

He also denied having being aware that the police had signalled him to stop. He said he was wearing a helmet which covered both his ears completely and that if one were to travel by the side of the road, which he did, one could only hear the sound of passing cars.

He stated that after passing a petrol station with Chan Ah Kow as pillion "suddenly a private car squeezed and grazed against my leg and I fell into the drain." He said his legs were pinned under the motor cycle.

As regards the red plastic bag of heroin he recounted how it came to be in the basket. He said he met Chan at a restaurant at Taman Pertama as appointed. The appointment was for Chan to recommend him a construction job. He said he had brought Chan, at his request to a place near Taman Yulek. Then Chan told him to stop near a flat. At that place Chan told him to wait as he was going to look for someone. He said he parked his motor cycle and went for a bowl of laksa at one of the hawkers' stalls some distance away. Ten minutes after he had taken his laksa while still at the stall he saw Chan walking towards his motor cycle. The accused went back to his motor cycle and he saw that Chan carried a red bag similar to P25. He noticed that the bag contained "something" but he did not pay attention to it and did not know what the bag contained. He did not ask Chan what it was either. Then according to him Chan told him, "Now you take me out. Then I will take you to have a look at the worksite." The accused said he then started his motor cycle and Chan put the red bag in front. Chan told him he had gone to look for someone. He said that Chan then requested him to bring him to the place where he had parked his car near the restaurant at Taman Pertama.

It is necessary to see what he had stated as regards how he came to know Chan and how and where he came to meet him that day. He had earlier stated that he was a construction contractor. He stated that he knew Chan only as Fei Lo and he had first met him about 3 years prior to their arrest at a tailor's shop at Jalan Chow Kit and that the next time he met him was at the Turf Club about 3 to 4 months prior to their arrest. He met him subsequently quite often on Saturdays and Sundays at the Turf Club.

He stated that the Sunday before their arrest, Chan had asked him whether he had any construction work. The accused replied he did not have any and Chan then "told me if he happened to come across any construction work he would recommend me and he asked me if I was interested and I said 'Yes'. The accused stated, "He said that if that was the case he wanted me to wait for him at Pertama Gardens near one restaurant." He was supposed to meet Chan at 9 a.m.

The accused met Chan on the appointed date at about 10 to 15 minutes past 9 in the morning. At the restaurant he stopped his motor cycle which he had borrowed from his younger brother. He said he had brought an extra helmet, which he normally did when he went out, and he saw Chan walk towards him. Chan then asked him to take him to a place near Taman Wah Yu (or Taman Yulek as he later said) for a while. He said he did so through a small path and he had to bypass a cemetery before reaching the place, the distance being about 1 to 2 miles.

So much for the evidence relating to his meeting with Chan and the reason for going to the flat. As recounted earlier the accused said that after Chan put the bag in front he asked the accused to bring him to the restaurant where he had parked his car. This was the place at Taman Pertama where the accused met Chan at 9.10 or 9.15 that morning. They were taking the main Cheras road this time to this place when the police car grazed against his leg.

The accused stated that he voluntarily gave a cautioned statement (D37). This substantially corroborated what he stated in evidence.

One other matter. Four cheques were found on him. His explanation was that he operated an illegal gambling den with some friends at Pudu. He explained that if the operators did not have sufficient cash they would try to borrow from "loan sharks" and use 3 of the cash cheques as security. He said the other cash cheque of RM4000 was from a gambler who had lost in the den and that man had issued the cheque in lieu of cash.

His first witness was Chan Ah Kow who had been charged on the original charge of jointly trafficking with the accused. I had acquitted him for the reasons stated in my judgment. His evidence was that he was a tailor who worked for his brother at Pudu Raya and that he also did cutting at other tailors' shops. He said he knew the accused casually. He said he came to know him in 1981 or 1982 at a tailor's shop at Chow Kit Road and he came to know that he was a construction worker when he came to the same tailor's shop for his shirts and trousers. Thereafter he used to meet him there. Three days before his arrest he had met the accused at the Turf Club and he had asked him if he had work and the accused replied that he did not have any as construction work was not good at that time. The accused said that he then told him he could recommend him some work and requested him to wait for him at a restaurant opposite the bus stop at Taman Pertama on 23 May 1984.

On that date after 9 a.m. he met the accused at the place. Chan said he went there in his car and he said he told the accused he would recommend him a job. He stated he had found a job for the accused to lay terrazo (flooring) and to fix iron grill and do some painting work at a worksite in Jalan Shaw and the accused wanted to look at the worksite before he could quote the price for the job.

When he met the accused he told the accused that he wanted the latter to take him to Bukit Mewah and then he would take him to the worksite. At first he said he told the accused that he wanted to go there to collect rent but on further questioning he said he did not tell him he was going to collect rent. The accused then took him to his flat at Jalan Mewah. He went up alone to his flat which he, as chief tenant, had rented out to one Lim Chang Ming (DW3) at RM180 per month. There he collected his rent from DW3. He said that then DW3 asked him to hand over a bag similar to P25 to a friend by the name of Ah Choy. DW3 told Chan that it contained medicine and he wanted Chan to hand it over to Ah Choy in front of Wong & Lee Clinic at Pudu. DW2 said DW3 was a wireman and a childhood friend.

It is convenient at this stage to set out what DW3 said about this incident. He said he had rented a room in a flat from Chan at RM180 p.m. He rented the flat towards the end of 1983. On 23 May 1985 Chan visited him at about 10 a.m. at the flat and collected the rent. As Chan left the flat 5 minutes later DW3 handed over a package containing heroin telling him it contained medicine and asking him to hand the package to one Ah Choy. He said he trusted Chan and he said the heroin he handed over to Chan did not constitute a large quantity.

DW3 said he knew Chan since his childhood days. He also said he was a wireman working for someone but that on that day he was unemployed. He said he had thrown away the keys to the flat. He denied that he did not live there. He said he had a few clothes with him at the flat but he did not keep any cooking utensils in the flat.

In his evidence he also stated he kept heroin in the flat in the room he lived in.

I now return to the evidence of Chan, DW2, Chan said after leaving the flat he met the accused and requested the latter to take him towards Pudu in order for him to hand over the package and at the same time to take him to Shaw Road to see the worksite. He said as there was a traffic jam then he intended to use the motor cycle to go there. As he sat on the motor cycle he put the plastic bag into the basket of the motor cycle. He said he did not discuss about the package with the accused. He stated that as they were proceeding towards Kuala Lumpur a car knocked into them and he fell by the roadside. He said the police did not show him the bag containing the drugs; instead he and accused's faces were covered up and he only knew the contents were heroin after he had been brought to an office. He denied that the police shouted out to them to stop. He said that at that time he was wearing a helmet.

He also stated he made a cautioned statement to the police where he had not told the truth to the police. He said he did not admit in the cautioned statement that he put the bag in the motor cycle basket. He also agreed he did not mention about DW3 in his cautioned statement.

As regards the cheques found in his possession he said as for 3 of them he had no time to cash them and as for one other (P11E) dated 29 March 1984 that was given to him in exchange for a loan that he had given to a friend but he could not cash it as his friend told him to hold on as he had money for it.

I now come to the evaluation of the defence which has to be done in the light of all the evidence adduced in the case.

As regards the evidence of the accused that he was not aware that the police had shouted out for him and the pillion to stop this is clearly unbelievable. PW4 had stated that he had shouted out at them to stop. But the accused and Chan countered this by saying they were wearing helmets. The accused explained he could only hear passing traffic. Surely a voice shouting out at close quarters would be louder than the sound of passing traffic. In any event the evidence showed that on each handle bar of the motor cycle was a mirror and surely the spectacle that PW4 was making of himself, poking his head out of the window of a moving car and flashing an authority card near them would certainly have been noticed through the right wing mirror. In any event why he did speed up a little bit and try to escape? Why did Chan look back off and on more often if the police had not identified themselves? To my mind the evidence of PW3 and PW4 was clear that the police had identified themselves as the police and the motor cyclist had heard and seen the police and was attempting to escape. I do not accept the defence evidence that the police car grazed against the accused's leg and that was why he sustained injuries thereon. I also do not accept the evidence that the drugs were not shown to them at the scene.

Why would the motor cyclist, the accused, attempt to escape unless he knew the package he was carrying was non-innocent. There is no dispute that the red plastic bag was in the motor cycle basket between his legs. In my view no doubt has been created on the prosecution's case as regards the police identification, the accused being the motor cyclist, he attempting to run away, and the discovery of the bag of drugs in the motor cycle basket between his legs affirming that he had control of the drugs.

The question now is whether he has rebutted the presumption that he trafficked in the heroin.

The defence story is that the accused came to carry the bag on his motor cycle as a result of a casual request of DW3 made to Chan to deliver a bag of medicine to one Choy. Would anyone hand over a bag of heroin, and in this case a bag of high purity heroin - since the grossweight of the substance in the 4 packages was 1795.42 grams and it contained 1599.74 grams of heroin, the purity was 89.19%, to a friend, even if the friend was a childhood friend, so casually? Highly improbable in my view. To my mind transporting a huge quantity of very high quality heroin from one place to another would require careful planning, secrecy and reliance on trusted couriers to protect the obviously huge investment that would have been made on the drugs and to prevent detection by the police. Here we have a case where the story is that Chan had merely chanced a visit to his flat to collect rent from his tenant, DW3 and he was immediately coopted to be delivery boy. Clearly an unbelievable story. The story goes further in that Chan was asked to deliver it to one Ah Choy, who, Chan said, he did not know well, and the bag was supposed to be delivered in front of Wong & Lee Clinic at Pudu - as casual as that.

Why did the accused and Chan go to the housing estate where Chan had a flat? The accused said the purpose of meeting Chan at Taman Pertama that morning was for Chan to show him the construction worksite Chan was recommending him but when he was there Chan requested him to take him to a place near Taman Yulek for a short while and he did not ask him why he wanted to go there. It will be remembered that Chan said he told the accused he wanted to go there to collect rent but on further questioning Chan changed his story and said he did not tell the accused that. I find that unusual. Chan wanted a favour from the accused to go somewhere and no explanation was preferred for going there. That apart, what was unusual was that Chan did not at that stage tell him where the worksite was - in fact no mention was made at all by the accused where the worksite was. The accused had stated that he met Chan at the Turf Club and work that Chan wanted to recommend him for was

the renovation of a house. When asked where this house was he said that he did ask Chan about it but that Chan hold him he would show him. Chan's evidence was that it was at Shaw Road. The accused never mentioned Shaw Road at all throughout his evidence although he had opportunity to do so. To my mind the story of a worksite was fabricated to explain why they met at Taman Pertama on 23 May 1984.

I come back to the reason why Chan wanted the accused to bring him to the flat. It was to collect rent from DW3 for his use of one of the rooms and the hall of his flat. Now that day was 23 May and he had still not collected his rent. Chan did say under cross-examination that he had gone to the flat previously several times but had not met DW3. He also said that DW3 was a wireman and he agreed that 23 May 1984 was a Wednesday and a working day. When asked how he knew that DW3, the wireman, would be in the flat that day when he was supposed to be at work he replied lamely, "I went there on several occasions and he was not in. On that day I went there again to take a chance." I find that his story of chancing a visit to collect rent from a wireman who, if he really lived in the flat, would probably have been at work well past 9 a.m. as again highly improbable and an invention to forestall the Court from inferring that there was a pre-arranged trip to the flat by him and the accused to collect heroin for distribution. Again if he had really met DW3 at the flat and the latter had given him the bag telling him it contained medicine and he did not know that it contained heroin, why did he not so mention that in his cautioned statement? For if that was the truth he should have stated it at the earliest time and avoided putting his own life in jeopardy. My finding is that DW3 was not a tenant of DW2 in respect of the flat and that the visit to the flat by DW2 was pre-arranged with the accused for the purpose of collecting heroin from the flat for transport elsewhere.

This finding is further supported by the evidence of the investigation officer (PW5) who was recalled by the prosecution to show that Chan led PW5 and a police party to the flat on the day of the arrest and PW5 found in one of the rooms heroin and some items of clothing - a shirt, 2 pairs of long pants and 4 pairs of shoes. PW5 said that the shirt fitted Chan well. Both pairs of trousers too fitted him on their length and the size of the thigh except that they were tight at the waist. Through the tailor's label on the 2 pairs of trousers he found that the tailor who made them is Chan's brother. As for the 4 pairs of shoes, 3 pairs fitted his feet while the fourth pair was too large for him.

I had allowed the recall of PW5 under s. 425 of the Criminal Procedure Code as I considered that DW3 had testified that Chan had no knowledge of the drugs at all. He had stated that he (DW3) had kept drugs in the room that he had rented from Chan. The DPP said he was caught unaware that DW3 was going to be called to give evidence on the accused's behalf. It will be remembered that it was only during the defence that the name of DW3 was first brought up. And it will be remembered that Chan testified that he had never mentioned the name of DW3 in his cautioned statement. DW3 himself stated he was arrested in 1985 for an offence under s. 39B of the Dangerous Drug Act. The charge in the present case relates to an offence under s. 39B in May 1984. In the circumstances it did appear that the DPP was indeed caught by surprise by the testimony of DW3 and DW3 had appeared to corroborate the defence story that Chan was not aware of the presence of the drugs there as Chan had paid a chance visit to him at the flat to collect rent from him. I allowed the Deputy Public Prosecutor to recall evidence to rebut that. And to my mind the evidence of PW5, when recalled, did rebut that. PW5 in fact had not heard of the name of DW3 during the investigations of this case. As regards the evidence of PW5 relating to the shirt, 2 pairs of long pants, an 4 shoes in the room where heroin was found I am of the view that the shirt,

2 pairs of long pants and 3 pairs of shoes were Chan's. Chan is a huge man and DW3 is of slight build and it seems to me that DW3's story that he left some of his clothings in his room where the heroin was found, to show that he indeed rented the room from Chan, cannot be true. Why would Chan's clothings and shoes be found in DW3's room? To my mind my earlier finding that DW3 was not Chan's tenant, that Chan did not therefore go there on a chance visit but had deliberately gone there to collect heroin for the purpose of transporting it elsewhere after a pre-arranged plan with the accused is further strengtened.

Clearly the story that he met the accused in front of the restaurant on 23 May 1984 for the purpose of bringing him to the worksite but incidentally visiting the flat is not worthy of credit. I accept there was a meeting there between Chan and the accused at sometime past 9 a.m. on that day and I accept the story that the accused took Chan to the flat using "a small path" but my view is that the sole purpose for it was to collect heroin form that flat and to deliver it elsewhere with the accused participating knowingly in the collection and transporting of the heroin. The accused and his motor cycle were necessary and integral elements in the scheme to transport heroin from the flat to somewhere else. It cannot be gainsaid that the motor cycle in the Malaysian scene is a ubiquitous vehicle which would hardly attract attention, fast and manoeuvrable and able to slip through heavy traffic unlike a car. Surely the choice of a motor cycle for use to deliver heroin that morning was no accident; it was a necessary vehicle to transport heroin in the heavy morning traffic along Cheras Road in relatively safe anonymity. And the accused was no innocent person riding his motor cycle blissfully unaware of the heroin; no reasonable doubt, as I had stated earlier, has been case on the prosecution's case that the accused attempted to flee from the police; the accused was part and parcel of the scheme to traffic in the heroin - he participated in the trafficking of the heroin.

There were attempts on his part to show that he did not know anything about the drugs. His story was he was merely a casual friend of Chan, he only knew him as " Fei Lo" and he went to see him on 23 May 1984 at Taman Pertama because Chan had offered to recommend him a job. I have my doubts as to a person going through all the trouble to look for and recommend a job for a casual friend. It would appear the first time the matter of a construction job for Chan was mooted on Sunday 20 May. The accused said that he met Chan on Sunday and Chan asked him whether he had any construction job and he replied he did not have any. According to the accused, "He (Chan) told me if he happened to come across any construction work he would recommend me ..." Now from this piece of evidence it is clear Chan did not have a job for him available as yet - if he happened to come across a job for him then he would recommend him. But in the next breath the accused said that when he told Chan he was interested Chan told him if that was the case he wanted the accused to wait for him at Pertama Gardens near one restaurant. How could it have been possible to fix a date for a job when Chan would recommend one "if he happened to come across any construction work..."? Chan spoke of the meeting with the accused on 20 May and he said he told the accused he could recommend some work, the implication being that he had some construction work ready then, not "if he happened to come across any construction work ..." To my mind there was no conversation relating to the construction job; there was an appointment, not necessarily on Sunday 20 May or at the Turf Club for the accused and Chan to meet for the purpose of going to the flat to collect heroin and for the accused to transport it on his motor cycle elsewhere, and the accused was aware of the purpose.

On his own admission the accused was operating an illegal gambling den with some partners for 19 days before the arrest. On his own admission he had paid the police off for operating the gambling den. He was a wordly man, not a naive man and I cannot believe his story of

being unaware that he was being used by somebody else other than Chan. My view of Chan as I have held earlier is that he was part and parcel of the scheme to deliver the heroin from the flat to some other place and I cannot believe that the accused could not have seen through Chan; the pre-arranged appointment was for the purpose of taking heroin from the flat for delivery on his motor cycle to some other place. There was no evidence that on Sunday 20 that the accused had agreed with Chan to use his motor cycle to visit the worksite. Why then an extra helmet for the use of a pillion rider? The accused denied that he brought the helmet because that was prearranged. He said he had brought the extra helmet because it was normal for him to do so "just in case." He added, "Sometimes my wife would go out with me." Viewing the evidence as a whole I find that hard to believe. The motor cycle was a necessary element of the scheme for the trafficking of the heroin and the helmet was for Chan who had to be carried pillion on the motor cycle.

One aspect of the story needs also to be considered. For the journey out of the area of the flat the accused took Cheras Road; that was his own choice. The accused said Chan told him to bring him back to his car at Taman Pertama, the place where they had their appointment that morning. That would have meant that Chan, if the story is true, had intended to bring him to the worksite in his car. But is they had intended to go to Chan's car why did not the accused use the path that he had taken earlier to visit Chan's flat? According to Chan using the path back would have entailed going uphill. That might be an acceptable explanation but for Chan's story that he requested the accused to proceed to Pudu (though he said he did not tell him the reason for going to Pudu) and to the worksite. So there was no question of going back to his car. The accused obviously tried to tailor his evidence to show that he was not using his motor cycle to go to the city. My view is that he was fully aware of what he was doing, delivering heroin from the flat on his motor cycle.

The accused had made a cautioned statement one day after his arrest. The statement is consistent with his evidence that he gave in Court. But I reject his cautioned statement in the light of my assessment of the defence story in the totality of all evidence adduced; my view is that the accused tailored his and the defence evidence to fit his exculpatory cautioned statement.

Having reviewed the totality of evidence adduced my finding is that no reasonable doubt has been created on the prosecution's case that the accused, riding his motor cycle, carried in a basket attached to the motor cycle and which was between his legs, a bag holding 4 packages containing 1599.74 grams of heroin, and that he attempted to flee from the police after the police had identified themselves, and that he had control of the heroin.

Having considered the totality of the evidence adduced, on a balance of probabilities, the accused was transporting the heroin fully aware of the heroin, for the purpose of distributing the large quantity of high quality heroin. The defence evidence viewed against the prosecution evidence clearly shows he was involved in the trafficking with a confederate and so far as the accused is concerned the charge of trafficking has been made out against him.

I find him guilty. And I convict him.

Also found at [1988] 2 CLJ 821